Sundance Construction Management, Inc. *and* Boise Carpenters. Case 27–CA–13549

June 30, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On April 18, 1997, Administrative Law Judge Frederick C. Herzog issued the attached decision. The General Counsel filed exceptions and a supporting brief, in which the Charging Party joined, and the Respondent filed a response and supporting brief, and a Motion to Reopen Record to Admit Additional Evidence, Motion to Extend Time to Reopen and Motion to Strike.[1] The General Counsel filed, and the Charging Party joined, a motion to strike the Respondent's response, an opposition to the Respondent's motions, and a brief in reply to the Respondent's responding brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] only to the extent consistent with this Decision and Order.

1. On July 18, 1994,[5] the day after employee George Maxwell took a day off for his daughter's surgery, Supervisor Dan Jafek asked Maxwell whether he had attended the union-sponsored ''Solidarity Picnic'' held the day before. Maxwell replied that he did not, but that he would have if he had known about it. The judge found that Jafek's question contained no express or implied threat of reprisal and concluded that the conversation was nothing more than ''polite small talk between work colleagues.'' Accordingly, he concluded that the Respondent did not unlawfully interrogate Maxwell in violation of Section 8(a)(1). The General Counsel and Charging Party except to the judge's dismissal of this allegation.

We disagree with the judge and find that the interrogation violated Section 8(a)(1). Maxwell was not a known union adherent at the time of the interrogation. By asking whether Maxwell attended the Solidarity Picnic, Jafek was obviously attempting to find out if Maxwell was sympathetic to the organizational campaign then in progress. Further, it was the supervisor, not the employee, who initiated the union discussion. Under these circumstances, we find that Jafek's inquiry into Maxwell's union sympathies had a reasonable tendency to interfere with, restrain, and coerce him in the exercise of his Section 7 rights, and thus violated Section 8(a)(1).

2. On October 30, Supervisor Dan Weatherbie asked employee Maxwell how many of the Respondent's employees supported the Union; Maxwell responded that approximately 80 percent supported the Union. Weatherbie advised him to be careful because, when he had been involved with a union, ''3,000 would vote to go on strike and only 3 would show up.'' The judge found that Weatherbie's statement was not a violation of Section 8(a)(1). The General Counsel and Charging Party except to the judge's dismissal.

We disagree with the judge and find that Weatherbie unlawfully interrogated Maxwell. Maxwell was still not known as an open and active union adherent at the time Weatherbie questioned him. Weatherbie's question and remark were not prompted by anything that Maxwell had said; rather, the exchange was initiated by the supervisor. Further, as in *Cumberland Farms*, 307 NLRB 1479 (1992), the fact that Weatherbie asked for information about the union activity of the entire unit, not just Maxwell's own union activity, is a factor militating in favor of finding the interrogation to be unlawful. Considering all the circumstances, we find that the Respondent's second interrogation of Maxwell had a reasonable tendency to interfere with,

[1] The Respondent's three motions all relate to complaint allegations that we find, in agreement with the judge, should be dismissed. Accordingly, we deny the Respondent's motions as moot.

[2] In his motion to strike, the General Counsel contends that, under Sec. 102.46 (d)(1) and (2) of the Board's Rules, the Respondent should have filed a single answering brief. Instead, the Respondent filed both a ''response'' to the General Counsel's exceptions and a ''brief in support of response.'' Therefore, the General Counsel moves to strike the ''response.''

Although the Respondent's submissions do not strictly conform to the requirements of the Board's Rules, they are not so deficient as to warrant striking. Accordingly, we deny the General Counsel's motion.

[3] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] Although the judge dismissed all of the General Counsel's allegations of unlawful interrogations, he made no specific findings concerning the allegation that supervisor Pearce unlawfully interrogated employee Maxwell on November 4, 1994. No exceptions were filed to the failure to find this interrogation.

In adopting the judge's dismissal of Sec. 8(a)(1) allegations concerning threatening picketing employees with arrest and issuing a warning to and threatening employee George Maxwell with layoff, we do not rely on the judge's analysis of *Operating Engineers Local 49 v. NLRB (Struksnes Construction Co.)*, 353 F.2d 852 (D.C. Cir. 1965), on remand 165 NLRB 1062 (1967). *Struksnes* does not apply in this case inasmuch as the Respondent did not conduct a poll of its employees' union sentiments.

[5] All dates are in 1994, unless otherwise specified.

restrain, and coerce him in the exercise of his Section 7 rights, and thus violated Section 8(a)(1).[6]

3. On November 7, when Maxwell was on the picket line at the Albertson's Meridian store with other employees, Weatherbie told Maxwell that he was ''disappointed'' in Maxwell and that he thought Maxwell ''knew better.'' The judge found that, rather than discouraging Maxwell's union activities, Weatherbie expressed his disappointment that Maxwell was not at the Burley jobsite, as promised, keeping an eye on a problem supervisor. The General Counsel and Charging Party except to the judge's dismissal.

We disagree with the judge, who apparently overlooked the fact that Maxwell's absence from the Burley jobsite was due to his participation in an activity protected by Section 7 and Section 13 of the National Labor Relations Act. We find that Weatherbie's expression of disappointment in Maxwell's participation in protected activity, and the suggestion that Maxwell should have been at work instead, reasonably could be understood as a threat of reprisal for supporting the strike. See *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 930 (5th Cir. 1993) (supervisor unlawfully threatened employee with reprisals by telling him that the company would ''look down'' on him and everyone else that ''went union.''). Accordingly, we find that Weatherbie's statement at the picket line violated Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Sundance Construction Management, Inc., Boise, Idaho, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activity.

(b) Threatening any employee with reprisal for engaging in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Boise, Idaho facility, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 1994.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply with this Order.

[6] The judge dismissed the allegations that the Respondent interrogated Maxwell in this manner ''in June and again in October,'' but he made no specific findings concerning the alleged June interrogation. We find it unnecessary to pass on the judge's dismissal of the allegation concerning the June 1994 questioning of Maxwell, because the finding of such an additional violation would be cumulative and would not affect the Order.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you about support for or activities on behalf of Boise Carpenters, or any other labor organization.

WE WILL NOT threaten you with reprisal for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SUNDANCE CONSTRUCTION MANAGEMENT, INC.

Michael W. Josserand, Esq., for the General Counsel.
Merrily Munther, Esq. (Penland Munther Boardman, Chartered), of Boise, Idaho, for the Respondent.
Alan Herzfeld, Esq. (Nevin, Kofoed & Herzfeld), of Boise, Idaho, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Boise, Idaho, on August 6, 7, 8, and 9, 1996, and is based on charges filed by Boise Carpenters (the Union) on January 9, 1995,[1] alleging generally that Sundance Construction Management, Inc. (Respondent), committed certain violations of Sections 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).[2] On February 28, 1995, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing[3] alleging violations of Section 8(a)(1), (3), and (4) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, carries on its commercial and industrial construction business at its facility in Boise, Idaho, where it admittedly annually derives gross revenues in excess of $50,000 from the sale and shipment of goods to points outside the State of Idaho.

Accordingly, I find and conclude that Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

The amended complaint alleges that on or about October 30, Respondent interrogated employees regarding their support for the Union and other protected activities, and threatened employees with reprisal for supporting the Union and engaging in protected concerted activities. It is further alleged that Respondent laid off two of its employees, George Maxwell and Mike Fuls, for engaging in a strike that took place the week of November 6, 1994, and has since failed and refused to reinstate the two. Respondent denies that these events ever occurred.

B. *Facts*

Respondent is a commercial building contractor, employing an average of between 40 to 50 hourly employees. Its construction business sends its employees to jobsites all around the Boise area, doing many different types of work. The work can range from a simple addition to a structure, to construction of a new office building, to interior renovation of a building. To accommodate its needs, Respondent employs people with a wide range of skills. At the end of a project, if Respondent has no further need for an employee, he or she is laid off, perhaps to be recalled later when more work is available. This is typical of the construction industry, which is project-oriented in nature.

The average workers employed by Respondent tend to be either carpenters or general laborers. Carpenters have general skills in carpentry and are expected to provide some of their own tools. The general laborers do concrete work, such as pouring and forming. Over these employees are the foremen. Foremen open up the project trailers and the jobsites in the mornings, set the employees into different work crews and direct them in the performance of their particular task. In charge of the entire project is the superintendent, the person responsible for a project. The supervisors contact the various subcontractors with a schedule of the project, and then discuss how the project will be completed and the time frame in which the project will be completed. The supervisors also schedule materials and manpower. Most projects will also have various subcontractors who have bid for portions of the project onsite.

Respondent, like the other construction companies in the Boise area, is not unionized. Karl Klokke, the president and CEO of the Company, testified that he runs the Company on a merit basis, with each employee negotiating individually for his or her wages. While seniority is a consideration in determining layoffs when they occur, it is not the only factor. Job performance and ability also rank fairly high in the decision. Because there is no union, employees with issues may take them to their foreman or superintendent, and if not resolved there, occasionally the superintendent may approach Klokke about an issue. Klokke testified that he thought employees should be able to come and see him if they had problems, and not be forced to go through third persons, i.e., a union representative.

Because none of Respondent's competitors were unionized, Klokke felt it would be at a harsh disadvantage were it [the Company] to become unionized before the rest of the companies in the Boise valley. Klokke expressed doubt that the Company could survive.

Prior to the summer, these concerns were nonexistent. There had been no talk of an organizational drive. But then rumors began to circulate that the Boise Carpenters were going to attempt to organize approximately 26 construction companies in the Boise area, including Respondent. A ''Solidarity'' picnic was held on or about July 18, presumably to garner support for the Union, and make employees aware of their options. At this point, there was still no large-scale ef-

[1] Subsequently amended July 12, 1996.
[2] Unless otherwise indicated, all dates refer to the year 1994.
[3] Also subsequently amended on July 12, 1996.

fort being made to organize Respondent. Around the first of October, however, Respondent was contacted by Tom Hazzard, of the Idaho Employers' Council. Hazzard had visited a union meeting and apparently seen employees of Respondent in attendance. Hazzard indicated that, should Respondent choose to enlist his services, he could provide information and guidance on how to deal with the situation of possible organization of the Company: how management was to handle any confrontations, what the Company could and could not do according to the law, and what each party's rights were under the law. By this time, Respondent was aware that the possibility of unionization was more than just a rumor, and hired Hazzard as a consultant. Hazzard continued to advise management of its options with regard to its actions. This continued for a little more than a month.

On November 6, three employees, Mike Fuls, Chaney Stotts, and John McMenemy, apparently acting as spokesmen for other employees of Respondent, approached Klokke and handed him a sealed envelope. Although the men did not say what the envelope contained, it was clear that demands from employees were being presented. Fuls testified that they had delivered a petition signed by carpenters in the Boise valley (of Respondent and other companies), and that it had called for an increase in wages and benefits. He also testified that they told Klokke the same petition was being delivered to all 26 companies, and that Respondent had not been singled out. The meeting among the four men was cordial, Klokke testifying that he told the men it was their right to go on strike, and the men saying it was not personal and that they appreciated working for Respondent. Klokke went back to his office and the three men left. There was apparently no verbalized discussion of demands. Rather, the men simply delivered the envelope to Respondent. Klokke turned the unopened envelope over to Hazzard, who also did not open it. Klokke testified that he never received any formal demands from the Union.

That day, those three employees and four other employees of Respondent, including George Maxwell, went on strike. They, and employees from other companies, struck several jobsites, including one of Respondent's, the Albertson's in Meridian. They remained on strike the entirety of the work week. The following Monday, the seven men presented themselves back at Respondent's office, and announced they were unconditionally returning to work. Respondent had not hired outside labor during their absence, but had moved its remaining employees around the various ongoing jobs to compensate for the shortage of the seven workers. Respondent shuffled the company replacements back to their prestrike locations, the seven men returned to work and the Company resumed normal operation.

On December 12, Respondent terminated Fuls and laid off Maxwell. Neither was ever recalled to work for Respondent.

C. *Discussion*

Initially, Respondent's employees must have been engaged in the exercise of Section 7 rights, or the remainder of the charges must fail. Here, the Section 7 activity in question occurred when the seven men walked off their various jobsites and joined the strikers from other companies at picketing sites at Hewlett Packard, Albertson's in Meridian, and other targeted locations.

Next, it is established that Respondent had knowledge of those activities. While Respondent stated that it had not been presented with any formal demands from the men, that is irrelevant. However, it had been given the sealed envelope the day the strike began, but did not choose to open it. Respondent deliberately chose to blind itself to the demands. Respondent had also managed to come into possession of a handbill from one of the union support meetings. The handbill indicated that the Union wanted a salary and benefits package totaling $22.50 an hour. There was therefore an understanding on Respondent's part as to the general nature of the Union's demands. These demands and the striker's concerted activity for ''mutual aid or protection'' put the strikers squarely within their Section 7 rights. It therefor appears clear from the facts, and indeed is not disputed, that the seven men who engaged in the strike were covered by Section 7.

Fuls was terminated, and Maxwell was laid off, within 1 month of a strike in which both had participated.

The General Counsel alleges that Respondent discharged them because of its antiunion animus, their participation in the strike, and their prounion stance, thus raising the 8(a)(3) claim. Respondent denies any wrongdoing on its part in letting the two discriminatees go and asserts that the men's' prounion sentiment was not a factor in its decision. Respondent further claims both men would have been fired anyway based on their record of mistakes on the job, and that the decision to let them go was made months in advance of the strike.

Thus, it is clear that the governing law in this case is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). There, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

> —First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision.
>
> —Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

In this case I conclude that the General Counsel has made a prima facie case that both men were discharged because of their participation in protected activities, including the strike of a few weeks preceding their terminations. That timing, taken together with Klokke's statements of the harm that would befall Respondent if the men succeeded in their protected efforts to unionize his Company, are sufficient unto themselves to make out the elements of such a case.

Thus, I find that this case is one to which *Wright Line* has application.

Accordingly, I now turn to the issue of whether or not Respondent has succeeded in its efforts to prove that the two men would have been discharged in any event, even absent their engagement in protected activities.

The issues of the case are essentially factual. The credibility of both the General Counsel's and Respondent's witnesses and the facts they have testified to are of paramount importance, especially as major conflict between the testimonies exists. The demeanor of the witnesses that I observed during the hearing, as well as the facts they attested to, determine my findings of fact on the disputed events of this case.

Respondent has pointed to a series of mistakes and problems with both discriminatees to account for its actions. In the cases of both men, Respondent's complaints refer to actions both recent and months old. That Respondent would, within 1 month of a strike in which both discriminatees participated, finally decide to let them both go from the Company bears a closer look. The timing of Respondent's decision certainly seems suspiciously questionable, in light of the fact that it had tolerated the two's actions for quite some time, until their sympathy for and involvement with the Union's organizing efforts became known. For when discharges involve ''key'' employees in an organizational drive, such discharges may take on the substance of an 8(a)(3) violation. *NLRB v. Davidson Rubber Co.*, 305 F.2d 166 (1st Cir. 1962).

In response to this, Respondent asserts the decision to get rid of Fuls and Maxwell was made prior to the two men walking the picket line at Albertson's. Respondent points to numerous complaints from both supervisors and fellow workers of the two men as forming the basis for its decision. Only if substantiated, will Respondent have successfully carried its affirmative defense under *Wright Line* that the two men would have been terminated anyway, regardless of their protected activity.

D. *Discharge of Fuls*

Fuls was terminated on December 12. Reasons given for his termination ranged from a ''poor attitude,'' to a bad work ethic, to a general inability to function smoothly with others in a work setting. Of course, an employee's ''bad attitude'' has been taken as being synonymous with a prounion attitude. *Marion Steel Co.*, 278 NLRB 897 (1986). To overcome the inference that Fuls and his ''attitude'' were targeted because of his union sympathies, Respondent must present very convincing evidence to the contrary, especially with regard to its peculiar timing in deciding when to finally take action on Fuls.

To meet this challenge, Respondent presented a veritable parade of its supervisors who testified as to their problems both with Fuls and the quality of his work.

Fuls, a carpenter in the Boise valley since 1986, began working for Respondent in June 1993. During the time of his employment with Respondent, Fuls worked at a number of jobsites as a journeyman carpenter. The jobs included the Nampa Housing Authority project, Idaho City project, Shari's Restaurant in Meridian, Reel to Reel Theater, the Albertson's at Overland and Five Mile, Country Club job, the 911 job, the Albertson's in Meridian, the Envirosafe job, and the VA lunchroom kitchen remodel job. Fuls primarily worked with concrete and rebar. The concrete work involved pouring slabs, sidewalks, stemwalls, and footings. Respondent's supervisors testified they found fault with almost each of Fuls' performances of these various skills. In addition to work-related mistakes made on the job, were accounts of insubordination and disruption of work crews.

Jon Anderson, a supervisor, credibly testified to several incidents involving Fuls. Around August 1993, Anderson testified to problems with Fuls and his attitude with respect to getting along with other employees. Fuls was abrasive to other members of the work crews, creating friction with his rude comments and sarcasm. This behavior continued, and in January, Anderson was forced to give Fuls a written reprimand to the effect that Fuls' ability to work with others was ''less than adequate,'' which Fuls signed. Fuls acknowledged the need to be more cooperative with his fellow workers in order to facilitate a smooth working relationship.

Dan Jafek, also a supervisor, credibly testified that he had problems with Fuls' work on the Nampa Housing Authority project. He testified that Fuls improperly set up a concrete slab pour, such that the resulting grade was too high. Fuls used the wrong stakes to prepare the pour, and the setup had to be redone. Further, Fuls was instructed how to set some steel posts for a trash enclosure, yet the final job was incorrect, according to Jafek.

Details on these mistakes were provided by two stipulations concerning Rick Winn, entered by the parties.

The first stipulation set out that Winn would testify that Fuls was left with instructions to set up the forms for a keyway, part of an addition onto a garage. When Winn returned, the slab was set up so that it was completely backwards. The forms had to be reset, as did the metal strip, which took an extra one and a half hours. Winn did it himself as soon as he saw the error, as the concrete trucks were on the way to do the pour. Fuls admitted that the keyway was not correct, but testified that Winn had fixed his error in 10 or 15 minutes.

The second stipulation on Nampa and Winn concerned a problem with footings for the trash enclosure, the steel posts Jafek referred to. Winn found that all the trash enclosure footings had been installed eight inches too high. An adjustment to the block and caps had to be made for appearance's sake, and 16 man-hours were spent correcting that error. Winn would also have testified that Fuls was an ''abrasive person, loud, obnoxious and arrogant,'' and that he asked Weatherbie not to send Fuls out to any more of his jobs. Fuls said he was not aware of any problems about the trash enclosure, which is different than testifying that there were no problems.

In reference to the Envirosafe job, Weatherbie credibly testified that Maxwell said Fuls had the crews upset and that he was being disruptive to their work procedures. There was also a stipulation that should Doug Zamzow testify, he would testify that Maxwell came to him on the Envirosafe job and detailed problems with Fuls. Fuls' attitude and work habits were causing ''resentment and hard feelings in the other crew members.'' Maxwell wanted the office to know so that ''corrective action could be taken.'' Fuls testified that he was not aware of any problems on the job except for his attitude, and that after the discussion with Anderson, the rest of the job was without incident. Weatherbie also testified that Maxwell said he did not want Fuls on his work crews on the 911 job, which started in June, because he was ''disruptive.''

Craig Hisaw, a fellow worker, credibly testified that he experienced difficulty with Fuls' attitude and willingness to work in the early part of November. The two had traveled to Marsing to correct some work on a concrete slab at the Citizens Utility Project. Hisaw testified that upon reaching

the work site, they poured the concrete. Then they went to lunch. Upon returning to the site, Hisaw began trowelling the concrete to finish the job. Fuls would not get out of the van to help complete the concrete work. Fuls stayed in the van until Hisaw was approximately three quarters of the way finished. Then Fuls alighted from the van, fixed a fence, helped do some edging of the slab, and asked to leave early. Hisaw related the incident to Weatherbie, and told him that Fuls would not be welcomed at any more of Hisaw's jobsites. This, incidentally, was prior to the strike.

Jafek, a supervisor for the Idaho City project, credibly testified that he asked Fuls to go to the jobsite and do a concrete pour. According to Jafek, Fuls laughed and said he would not go, and that Jafek could get someone else to do the work. Jafek testified that at this point, he ''had no use'' for Fuls anymore, due to this type of disobedience. Fuls denied the entire incident, claiming he had never refused to work for anyone.

A stipulation regarding the Boise City Housing Authority and testimony by Coates was entered. Coates would have testified that one entire section of the sidewalk Fuls poured had to be demolished and redone. Fuls testified he was never reprimanded in connection with this job.

There was a stipulation that should Joel Hartman testify, he would detail problems with Fuls in the summer of 1994. Hartman was in charge of the concrete work being done on the VA lunchroom kitchen remodel job. Fuls apparently ''would not accept direction from him.'' Hartman then spoke to Anderson and told him that if Fuls would not accept direction from him, Hartman wanted him gone from the job. Fuls testified that Hartman never told him of any problems.

One final stipulation with respect to Fuls and the quality of his work was entered. Dale Frazell was a supervisor on the Reel to Reel Theaters, the last job that Fuls worked on while employed by Respondent. Frazell would have testified that the work assigned to Fuls was performed in an average manner, except for two jobs. First, Fuls apparently set an incorrect concrete slope for drainage, which resulted in water flooding the theater. Second, the fire doors were installed upside down, which voided their warranties. Fuls denied having installed the doors upside down, claiming that the labels were put at the bottom of the door instead of at the top, so that it was not his fault.

The foregoing stipulations were entered into by the parties, to stipulate that had the various witnesses been called, they would have testified to the events as detailed. These stipulations are not necessarily binding upon me. Rather, the trier of fact is free to consider the weight and credibility of such evidence the same as any other evidence adduced on the hearing in the case. That said, I do find the stipulations presented by Respondent and agreed to by the General Counsel to be binding, and make the findings of fact in Respondent's favor, in light of my previous findings regarding the credibility of the various witnesses.

The overwhelming preponderance of the testimony regarding Fuls describes him as a difficult person to work with, insubordinate at times, and quite rude. Respondent had ignored this behavior for most of Fuls' employment, with the exception of the written warning issued by Anderson, and a verbal warning from Anderson and Zamzow on the Envirosafe job that Fuls needed to ''play nice with the other kids.'' Respondent had been taking notice, however, of Fuls' job performance.

I find that the evidence of detailed and numerous instances of mistakes made on the job, when combined with the obnoxious nature of Fuls' attitude, lends credence to Klokke's and Weatherbie's credible testimonies that they had already planned to terminate Fuls prior to his participation in the strike. I find that the precision of Respondent's testimony with respect to Fuls and his problems defeats the inference that he was terminated 1 month after the strike simply because of his participation in it.

One remaining issue raised by both the complaint and the testimony revolves around the exact nature of Fuls' departure from the Company. Specifically, Fuls testified that he was laid off on December 12. Fuls then attempted to get from Weatherbie a ''pink slip'' stating he had been laid off due to lack of work. According to Fuls' testimony, Weatherbie said he did not have to give Fuls a pink slip. This prompted Fuls to state to Weatherbie that he felt he was being discriminated against because of his union activity, and was going to file a charge to that effect. Fuls testified that at this point, Weatherbie told Fuls he was terminated and not laid off.

At this juncture, it is important to note where Fuls received his initial information on his separation. When Fuls showed up to work on December 13, it was Dwayne Hickam who told Fuls he had been laid off, not Weatherbie. All Hickam knew was that Fuls was ''not supposed to be at work that morning,'' Hickam, however, was not involved in the making of the decision, and had no actual knowledge of the facts actually surrounding the nature of Fuls' separation. Fuls, therefore, got this information from someone not apprised of all the facts, as opposed to hearing directly from his supervisor. Additionally, by the time of this hearing, Respondent had already let Hickam go because he had been involved in an altercation on the job. Hickam testified he felt his own separation from Respondent was not justified. Thus, Hickam still quite evidently harbored resentment towards Respondent at having been ''wronged'' by his previous employer. Hickam, as demonstrated by the testimony presented to me, was not the most credible of witnesses.[4]

The testimony on this issue was in direct contradiction, with Fuls claiming he had been told he was to be laid off and Weatherbie claiming Fuls had been terminated. While both testimonies were motivated by the self-interest of the respective witnesses, I found Weatherbie to be the more credible of the two, and hence adopt his testimony for my finding of fact on this issue. Further, the stream of evidence presented by Respondent pointed to the fact that a decision to terminate Fuls had in fact been reached before the strike, as both Klokke and Weatherbie testified. That decision to get rid of Fuls permanently, by termination, as opposed to a temporary layoff, was based on the repeated mistakes he made while on the job, his poor attitude, and the difficulties he presented to others attempting to work with him. Instructive on this point is *Frosty Morn Meats, Inc. v. NLRB*, 296 F.2d 617, 621 (5th Cir. 1961):

[4] At several points in his testimony, Hickam was unable to restrain vociferous outbursts of animosity directed at Respondent.

> When an employee gives his employer as much reason to fire him as Judkins did, by refusing to follow instructions and by giving not only his supervisors but also his fellow employees the impression that he was uncooperative, there is no basis for the conclusion that the employer has treated him differently than he would have treated a nonunion employee.

This description matches Fuls. Based upon the foregoing analysis, regardless of Fuls' involvement with the Union, I find and conclude that Respondent would have terminated him anyway. Therefore, the issue of Respondent's timing in terminating Fuls is resolved. Fuls was not terminated earlier because of the ''crunch'' Respondent was under in trying to complete two jobs before the Christmas season. When Fuls was finally dismissed from Respondent's employ, he was part of a general lay off that Respondent was conducting anyway, a downsizing that continued for several months. Fuls' termination was not a single, atypical event. Rather, Respondent was following its usual practice of letting people go once it had no further need for them, beginning with the people Respondent had no desire to keep due to performance or skill issues. Respondent would have terminated Fuls anyway, regardless of his protected activity. Thus, I conclude that Respondent has carried its burden of persuasion under *Wright Line* and is absolved of any 8(a)(3) violation with respect to Fuls.

E. *Layoff of Maxwell*

The same day that Fuls was terminated, Maxwell learned that he had been laid off, supposedly for lack of work. He was not told the layoff was because of any performance issues. In testimony, however, a range of problems were enumerated by Maxwell's supervisors. These included a deficiency in blueprint reading skills, problems with layouts, and general mistakes that occurred while he was acting as a foreman. Interestingly enough, in spite of the plethora of mistakes Maxwell allegedly committed, Maxwell testified that Weatherbie told him to check back after the first of the year, meaning 1995, and that Respondent might have work for him. Weatherbie agreed that he had probably given Maxwell some encouragement to that effect.

Again, to prevail, Respondent must successfully rebut the implication that Maxwell was laid off because of his union affiliation. Further, the evidence presented must convincingly show Respondent would have terminated Maxwell anyway, regardless of Maxwell's involvement with the Union. As with Fuls, the timing of Respondent's election to lay off Maxwell seems suspicious, and bears close scrutiny.

Maxwell's history with Respondent was more extensive than that of Fuls'. He began working for Respondent in 1991 on the Chief Joseph Elementary School project, making $13 an hour. He was then laid off for 9 months, worked with another company, then came back to Respondent in the beginning of 1992 and continued on until December of 1994. Maxwell's primary job seems to have been that of a night foreman.

Upon returning to work for Respondent, Maxwell worked at a number of jobsites, including Boise City Housing, the MK depot, the LDS Church, the BSU geology building, National Interagency Fire Center (NIFC), the Envirosafe project, Shari's Restaurant in Garden City, the Albertson's remodel on Overland and Five Mile, the Albertson's remodel in Burley, and the Idaho City School project.

Respondent presented the testimony of a number of Maxwell's supervisors indicating his various shortcomings, notably his poor mathematical and blueprint reading skills, which tended to result in work having to be done a second time.

One frequent complaint revolved around Maxwell's print reading abilities. This apparently was noticed for the first time at the MK Depot and BSU Math/Geology projects, started sometime in 1992. Oliver Steiger, the project superintendent, credibly testified that Maxwell's blueprint skills were ''on the shaky side.'' According to Steiger, Maxwell frequently spent a lot of time reviewing drawings with him. Steiger further noted that he would have to doublecheck layouts Maxwell had done to make sure they were correct.

Maxwell worked for a time as a foreman on the Envirosafe project, which ran the winter of 1993/1994. Klokke testified that Anderson later requested Maxwell not return to work on any of his projects. Evidently, this was in response to problems with the placement of columns and some problems with layouts. Some columns were of an incorrect height by approximately two inches, as their elevation had been improperly shot. While Weatherbie noted that this could have been a blueprint reading error on Maxwell's part, he said it was attributed to poor management of the work force, mainly a mistake.

The NIFC job ran from April of 1993 to April of 1994. Maxwell was a foreman on the concrete crew for a portion of the job. A stipulation was entered by the parties that should Hartman testify, he would relate how Maxwell set up forms for trenches incorrectly, and that they were 21 feet off from the layout. Hartman and another worker tore out Maxwell's work and redid it, taking an extra one and a half days to do so.

The Albertson's remodel at Overland and Five Mile started in March and was completed in June. At the start of the job, Lee Coates acted as night foreman, and Maxwell took that job once Coates left. Night foremen on Albertson's remodels primarily do fixture work. As such, Maxwell directed the work crew to erect shelving the food would eventually go on, install the check stands, and install the equipment in the meat department. The fixture part of the contract was overbudget by about $5000 which Klokke attributed to poor management of the work force, a portion of which was Maxwell's fault.

As the night foreman for the Albertson's in Burley, Maxwell was on site overseeing the wood trim work performed by the carpenters. Maxwell apparently encountered problems interpreting the blueprints' directions for installation of the trim. Dresser noted that the plans were very specific in terms of the trim installation, and that the crews were off in their work, which came back to Maxwell's direction. Maxwell also oversaw work on the Marlite planking, a type of paneling glued to the walls. Maxwell had the blueprints for the work and was supposed to direct the crews accordingly. However, the Marlite was installed incorrectly and had to be significantly reworked. Dresser ascribed the rework to failure on Maxwell's part to read the blueprints properly. This rework occasioned a higher cost in labor, which resulted in cost overruns on that portion of the contract.

The 911 Center project in Jerome, begun over the summer, saw Maxwell acting again as a foreman, involved with steel

erection. There was conflicting testimony on this issue. Weatherbie testified that Maxwell installed the steel incorrectly, by burning a hole in the steel with a torch. The problem ballooned from there, because the burned hole was too big, which caused the engineer to reject the structure, resulting in redesign and changed finishes. According to Weatherbie, no holes were to be cut in the steel unless authorized by the engineer or himself, and Maxwell did not get this authorization. There was some evidence, however, that the steel had initially arrived in an unusable fashion, and therefor had to be cut for proper use. Maxwell did not appear to be at fault for the steel needing to be cut.

One major incident involving Maxwell took place at the Shari's at Garden City. Winn had prefabricated the forms that were to be used as guides for the concrete pouring. Maxwell did not follow the forms as constructed for the job. He did not ask how they were to be put together, and instead, proceeded to cut them up, drilling new holes and rendering them unusable for future work. The cost of replacing the forms was around $2000 and required 40 man-hours of work. Granted, the new forms could be used at the next Shari's that Respondent contracted to work on, but the original forms were satisfactory for this job and did not need to be altered. Maxwell testified that it was not apparent from looking at the forms how they were supposed to be put together. It seems, however, that the forms would have had a form oil residue on one side, from the last time they were used. The oil is used to coat the forms on the side that the concrete is poured against, to keep the concrete from adhering to the forms. Thus from the outset it would have been apparent which side faced in and would have the concrete molding to it. This, in addition to the unique shape of the Shari's Restaurants, should have made it apparent how the forms combined, as there could be only one correct way.

The Idaho City job saw several incidents relating to Maxwell take place. Jafek was again a supervisor. In July, Maxwell did not follow Jafek's instructions regarding removal of playground equipment, and it was subsequently ''extensively'' damaged. On November 16, Jafek issued Maxwell a written warning regarding the improper setup of a chop saw, a dangerous piece of equipment. Jafek did so because the way in which Maxwell was using the saw was a safety violation, with the potential for grave injury. In addition, Maxwell laid out some footings incorrectly, which had to be corrected before the excavator began digging. Jafek also found fault with some saw horses Maxwell built. Jafek testified that a good saw horse could normally last for up to a couple of years, whereas these were unusable in a week or two.

Perhaps the most significant occurrence at the Idaho City job related to the written warning Maxwell received on November 16 for tardiness. He was late to the jobsite, and had not called in advance. Jafek issued him a warning. Maxwell testified that he asked around, and that three other men were late that morning but that none of them received a warning. However, Maxwell was unable to remember any of the men's names. Jafek, who kept notations of events that occurred during the day in a notebook, credibly testified that if anyone else had been late, it would have been so noted. According to Jafek, no one else was late that day, and Maxwell had not been singled out. Another employee named Jeff Dunham was also issued a written warning for tardiness 2 days later. Dunham had not participated in the strike. The General Counsel attempted to show by this incident that Jafek was ''making book'' on Maxwell because of his participation in the strike. This attempt fails for two reasons. First, Jafek had had problems with Maxwell before November, as the playground incident in July evidenced; indeed, as early as 1992 at the Chief Joseph School project Jafek had witnessed problems with Maxwell's performance. Second, Maxwell was not targeted exclusively for some sort of disparate treatment by Jafek. When Dunham, who was never a striker, was late to the job, he was also issued a warning. Maxwell simply made many mistakes on the Idaho City job.

Small complaints from various other jobs were also noted. Steiger testified that on the BSU job, Maxwell was too ''hot headed.'' The Chief Joseph School project, of which Jafek was the supervisor in 1992, saw Maxwell predrill holes in the floor in the wrong place, such that they had to be redrilled. In February of 1994, Maxwell put a concrete mow strip in the wrong place at the LDS Church. Jafek had Hartman redo the strip.

Interestingly enough, in spite of Maxwell's various shortcomings, Klokke gave him a raise some 8 months before he was laid off. Maxwell had come to him and ''demanded'' a raise and an increase in responsibility. Because of a professed shortage of qualified supervisors, Klokke raised his wage from $13.50 to $14.50 an hour to entice him to stay on, but did not make him a supervisor. Klokke felt they could not afford to let Maxwell go, but that he was not ready to act as a supervisor. Klokke was asked why, after receiving reports of Maxwell's deficiencies, Klokke did not simply demote him. Klokke noted that it had been his experience that once an employee had been promoted (as Maxwell had been to foreman), it was almost impossible to later demote and still retain a profitable employee. There would simply be too much hostility on the employee's part to be able to maintain any semblance of a working relationship. Klokke said a demotion and subsequent retention had only worked for him once in the last 10 years, and he was not willing to try it with Maxwell. A demotion from foreman to general carpenter was therefor not workable in Klokke's opinion. In the absence of an attempt by an employer to circumvent the Act, the Court will not substitute its judgment for that of the employer, especially when it appears that a sound business decision was being implemented.

The evidence appears clear that Respondent observed numerous job-related shortcomings on Maxwell's part, inclusive of blueprint reading difficulties and math skill deficiencies. Many of these problems were noted prior to Maxwell's going on strike. Respondent had good reason to lay off Maxwell.

In conclusion of the 8(a)(3) issue, the mere fact that a specific employee not only breaks a company rule but also evinces a prounion sentiment is alone not sufficient to destroy the just cause for his discharge. *NLRB v. Mueller Brass Co.*, 509 F.2d at 711 (5th Cir. 1975).

As such, Respondent's legitimate, business-related reasons for discharging both Fuls and Maxwell, reasons that were independent of the two's affiliation with the Union, withstand scrutiny. The two men, as indicated by multitudinous evidence, had performance problems that occurred over a long period of time and were well-documented by Respondent. Although Respondent could have legitimately terminated the two men months before, because of a need for experi-

enced manpower Respondent kept the two men on and put up with the problems.

Once Respondent began to downsize in December, a process that continued into 1995, it decided it was time to let them go. The discharge of Fuls and Maxwell occurred 1 month after their participation in the strike, and this required Respondent to convince me that but for their union activities, the two would have been terminated anyway. Respondent managed, through a comprehensive array of testimony and other evidence presented, to do just that. Finally, inconsistencies in testimony and other credibility issues that were resolved against the two alleged discriminatees also led me to find that Respondent did not violate Section 8(a)(3) by discharging Fuls and Maxwell.

My finding that there has been no violation of Section 8(a)(4) of the Act flows from the same facts and analysis.

F. *Interrogations Regarding Union Activity and Threatened Reprisals*

The second amended charge, filed July 12, 1996, adds the allegation that Respondent, through its agents, interrogated employees about their union activities and threatened employees with reprisals and arrest for their support of the Union, thereby violating Section 8(a)(1).

In a case involving ''interrogation,'' the basic test used by the Board to determine whether a violation occurred is whether the employees' rights were interfered with by the employer. What constitutes interference must be determined by looking at the record as a whole, as suggested in *Blue Flash Express, Inc.*, 109 NLRB 591 (1954). Unfortunately, testimony of the various witnesses failed to elucidate exactly how Respondent managed to interrogate its employees in the coercive nature required by the Act. Indeed, in the hearing, General Counsel failed to address several specific allegations of interrogations made in the complaint.

One allegation in particular may be cleared up very quickly. Both the complaint and testimony attempted to show that one night during the strike, Weatherbie had threatened pickets at the Albertson's in Meridian with arrest for being there on the property and exercising their right to picket. A threat of arrest did, in fact, take place, but the facts are sorely out of context. Weatherbie arrived one night just in time to see a man harassing a woman, who was obviously upset. Weatherbie testified that at the time, he did not see men holding picket signs. The obstreperous man, not an employee of Respondent, had apparently been drinking. Weatherbie testified that the store manager had called the police, and that he asked the men to stay until the police arrived. At this time, the remainder of the pickets were making their way around to the front of the store, drawn by the raised voices. The man who had started the incident asked Weatherbie how he was going to make them stay for the police, and Weatherbie said they could consider themselves under citizen's arrest. That was the extent of the ''arrest'' incident. Respondent quite simply did not threaten to have pickets arrested because of their strike activities.

Another ''interrogation'' centered around the Solidarity picnic held in July. Maxwell had taken the day off to take his daughter to surgery. Upon returning to work, a supervisor, Jafek, asked Maxwell if he had attended the picnic. Maxwell replied that he had not, but if he had known about it he would have. That was the extent of the conversation. There was no overt or implied threat, or a warning of reprisals for entertaining such sentiments. Although the picnic had already taken place, there could have been threats not to engage in those sorts of activities if they again presented themselves. Such comments were not made. Indeed, it is hard to see the ''incident'' as anything other than polite small talk between work colleagues.

Some of the alleged ''interrogations'' regarding union activity took place, according to General Counsel, in June and again in October. Klokke admittedly asked Weatherbie to find out how widespread support for the Union was within the Company. One particular time, Weatherbie asked Maxwell how many employees of Respondent he thought supported the Boise Carpenters. Maxwell replied that he thought perhaps 80 percent of Respondent's forces were in favor of the Union. Weatherbie then told Maxwell to be careful, because he had been involved with a Union before and ''3,000 would vote to go on strike and only 3 would show up.'' That was the extent of the ''warning'' Weatherbie gave to Maxwell. The statement centered on knowing one's compatriots, and did not purport to threaten Maxwell in any way, nor could it realistically be taken to do so.

Again, with regard to the ''interrogations,'' there was conflicting testimony as to the actual nature of the events that occurred. Maxwell testified that Weatherbie would call him at the jobsite and ask him about ongoing union activity. Weatherbie, in turn, testified that Maxwell was the one in contact with him. According to Weatherbie, Maxwell said he was only involved with the Union to find out what was going on and that he did not support it.

Another conflict exists with respect to the comments Weatherbie made to Maxwell while he was on the picket line. Weatherbie told Maxwell that he was ''disappointed in him'' and that he ''thought he knew better.'' General Counsel attempted to make this appear to be a discouragement of the union activities. In fact, Maxwell had promised Weatherbie that he would be looking in on John Pearce, the supervisor at the Albertson's jobsite in Burley. Weatherbie had been receiving reports that Pearce was not on the job as he was supposed to be, and had requested Maxwell to look into it. When Maxwell showed up in Meridian, Weatherbie was understandably disappointed, as he now did not have anyone on location at the Burley site to oversee the situation there.

Due to the limited nature of any questions that were asked, that fewer than three of Respondent's employees were ever approached with such questions, and the low-key nature of any conversations, none of the coercive ''polling'' that the Board so disfavors appears to have taken place. See *Operating Engineers Local 49 v. NLRB (Struksnes Construction Co.*), 353 F.2d 852 (D.C. Cir. 1965), on remand 165 NLRB 1062 (1967).

The General Counsel has attempted to piece together a few questions and offhanded comments to form a tapestry of interrogation and other violations of the Act. But allegations of 8(a)(1) violations through interrogations must fail when, on viewing the record as a whole, no coercion of employees occurred by virtue of the conduct at issue.

Thus, I conclude that the General Counsel has failed to carry its burden of persuasion by establishing by a preponderance of the evidence that Respondent has committed any

unfair labor practices as covered by the Act. The complaint should be dismissed.

Based on the foregoing findings of fact, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. The General Counsel has failed to establish by a preponderance of the evidence that Respondent has violated Sections 8(a)(1), (3), and (4) of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed in its entirety.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.